Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1517

RAYMOND T. KWIEK,

Petitioner,

vs.

THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF SCHAUMBURG, MARTIN J. CONIGLIO, CHAIRMAN OF THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF SCHAUMBURG, FRED W. VOLKENING, MEMBER, BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF SCHAUMBURG, DONALD I. PETERSON, MEMBER, BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF SCHAUMBURG, AND MARTIN J. CONROY, CHIEF OF POLICE OF THE VILLAGE OF SCHAUMBURG,

Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT.

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TABLE OF CONTENTS.

	PAGE
Statement of the Case	1
Reasons for Not Granting the Writ:	
I. The Petitioner Was Not Denied His Fourteenth Amendment Right to Due Process Because the Courts Failed to Consider the Constitutionality of Rules 20, 22 and 38	8
II. Paragraphs 20, 22 and 38 of the Rules and Regulations of the Schaumburg Police Department Are Not Unconstitutional	10
Conclusion	15

LIST OF AUTHORITIES CITED.

Alexander v. Louisiana, 405 U. S. 625, 633 (1972), 31 L. ed. 2d 536, 544	8
Arnett v. Kennedy, 416 U. S. 134, 40 L. ed. 2d 15 (1974).	12
Bishop v. Wood, No. 74-1303, decided June 10, 1976, ... U. S. ....., 44 LW 4820, 4822	10, 14
Broadrick v. Oklahoma, 413 U. S. 601, 37 L. ed. 2d 830 (1973)	12
Burton v. United States, 196 U. S. 283, 295 (1905), 49 L. ed. 482, 485	8
Chaffin v. Stynchcombe, 412 U. S. 17 (1973) (distinguished)	10
City of Chicago v. Fort, 46 Ill. 2d 12, 16 (1970)	12
City of Chicago v. Lawrence, 42 Ill. 2d 461, 464 (1969).	12
City of Decatur v. Kushmer, 43 Ill. 2d 334, 336 (1969) .	12
Davern v. Civil Service Commission, 47 Ill. 2d 469 (1971)	9

DeGrazio v. Civil Service Commission, 31 Ill. 2d 482, 489 (1964) 9

Flynn v. Giarrusso, 321 F. Supp. 1295 (E. D. La. 1971) (distinguished) 13

Goldberg v. Kelly, 397 U. S. 254 (1970) (distinguished) . 9

Hagans v. Lavine, 415 U. S. 528, 547 (1974), 39 L. ed. 2d 577, 594 8

Herzbrun v. Milwaukee County, 504 F. 2d 1189 (7th Cir. 1974) 11, 12

Kelley v. Johnson, 47 L. ed. 2d 708 (distinguished) 13

Moriarity v. Police Board of Chicago, 7 Ill. App. 3d 978, 982 (1972) 9

Muller v. Conlisk, 429 F. 2d 901 (7th Cir. 1970) (distinguished) 11

Osborn v. Village of River Forest, 21 Ill. 2d 246, 249 (1961) 8

Parker v. Levy, 417 U. S. 733, 41 L. ed. 2d 439 (1974) . 12

People v. Dixon, 28 Ill. 2d 122, 125 (1963) 8

People v. Vandiver, 51 Ill. 2d 525, 527 (1971) 8

Railroad Commission of California v. Pacific Gas and Electric Company, 302 U. S. 388 (1938) (distinguished) .. 9

Secretary of the Navy v. Avrech, 418 U. S. 676, 41 L. ed. 2d 1033 (1974) 12

United States v. Campos-Serrano, 404 U. S. 293, 295 (1971), 30 L. ed. 2d 457, 460 8

United States Civil Service Commission v. National Association of Letter Carriers, 413 U. S. 548, 37 L. ed. 2d 796 (1973) 12

STATUTES AND RULES.

Illinois Revised Statutes, 1975, Chapter 110, Section 23 .. 7

Illinois Revised Statutes, 1975, Chapter 110, Section 264 . 6

Illinois Revised Statutes, 1975, Chapter 110, Section 272 . 6

Village of Schaumburg Board of Fire and Police Commission Rule 18 2

Village of Schaumburg Board of Fire and Police Commission Rule 20 .....2, 6, 8, 9, 11

Village of Schaumburg Board of Fire and Police Commission Rule 22 .....2, 6, 7, 8, 9, 10, 11

Village of Schaumburg Board of Fire and Police Commission Rule 38 .....2, 6, 8, 9

Village of Schaumburg Board of Fire and Police Commission Rule 39 2

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STATEMENT OF THE CASE.

The petitioner's statement of the case is not only highly selective—it is patently misleading. It presents to the Court a totally false picture of the issues raised in the trial court and the Appellate Court. It seeks to present to this Court constitutional questions which were never raised in the trial court and which

need not have been considered by either the trial or the Appellate Court in reaching their decisions.

The petitioner would have this Court believe that his dismissal was based solely upon of his exercise of freedom of speech. By omitting most of the relevant material in the proceeding before the administrative agency and the trial court, the petitioner fails to fully inform this Court of the issues that were properly determined by the state courts and clearly do not involve any questions which either vest jurisdiction in this Court or call upon this Court's authority to exercise its discretion to consider this matter.

The petitioner fails to inform the Court that, in addition to violations of Paragraphs 20, 22 and 38 of the Rules of the Schaumburg Police Department, the petitioner was also charged with and found guilty of violating Paragraph 18 for giving false reports, Paragraph 39 for failing to report a subpoena to his superior officer, and for incompetency and inefficiency, for disregarding Rules and Regulations and a General Order by removing case reports without proper authorization. These specific charges, in no way referred to in the petition, included the following:

> "1. Paragraph 18 of the Schaumburg Police Department Rules and Regulations reference to false reports and whereby you made a misstatement involving a criminal case which was being conducted by the Schaumburg Police Department by Sgt. Hammond of the Schaumburg Police Department." (Abst. A1)
>
> "5. Paragraph 39 of the Schaumburg Police Department Rules and Regulations reference to subpoenas whereby you failed to immediately notify your immediate commanding officer that you had received a subpoena to testify for the defense in a criminal matter pending with the Schaumburg Police Department." (Abst. A2)
>
> "6. Incompetency and inefficiency whereby you disregarded Rules & Regulations and failed to adopt a proper police attitude, as well as your obligation as a police officer

> to supply any and all information within your knowledge relative to department affairs and involving a criminal action that involved the Schaumburg Police Department and one of its members; also whereby you violated General Order No. 71-5 issued July 26, 1971 reference to removing of reports, to-wit, D.W.I. case reports without proper authorization." (Abst. A7)

The petitioner does not inform the Court that he was found guilty of these three charges.

The Findings and Decision of the Board of Fire and Police Commissioners, entered on April 17, 1972, which was the subject matter of the administrative review proceeding in the trial court, contained the following Findings:

> "6. Respondent, as charged herein, and contrary to the aforesaid Rules and Regulations for the Police Department of the Village of Schaumburg was guilty of making misstatements and false reports verbally on or about July 21, 1971, September 15, 1971, and September 27, 1971, in violation of Paragraph 18 of Section 1 of said Rules and Regulations, in that he knowingly stated to superior officers on those dates that he had no recollection of events taking place on June 29, 1971 relative to the arrest of William Heidt, whereas in a subsequent written statement made by Respondent on September 27, 1971 he related the details of such events." (Abst. A10)
>
> "10. Respondent, as charged herein, and contrary to the Rules and Regulations of the Police Department of the Village of Schaumburg, Illinois, including Paragraph 39, Section 1, of said Rules and Regulations, was guilty of failing to report to his Commanding Officer that he had been subpoenaed to appear for the defense in the prosecution of the criminal case against William Heidt." (Abst. A13)
>
> "11. Respondent, contrary to his oath of office as a police officer, and contrary to a direct written order of the Chief of Police, namely, General Order No. 71-5, issued July 26, 1971, did: A) remove certain police reports relative to the aforesaid 'Greco matter' from the official and

confidential files of the said Police Department; and B) remove from said official files of the Police Department reports relating to the charges of driving a motor vehicle while under the influence of intoxicating liquors, all without the consent, knowledge or authorization of the Chief of Police or any other superior officer." (Abst. A13)

In describing the evidence before the administrative agency, the petitioner totally ignores the evidence upon which the Board of Fire and Police Commissioners found the petitioner guilty. This evidence was before the trial court and the Appellate Court, both of which affirmed the decision of the administrative agency. The evidence indicates that the petitioner was present at the home of one, William Heidt, a former police officer, at the time Heidt was arrested for theft and the stolen goods were discovered on the premises. This incident occurred on June 29, 1971. The evidence indicated that on July 21, September 15 and September 27, Kwiek had stated to superior officers that he had no recollection of the events taking place on that date. Subsequently, he gave a written statement relating the details of the events which had taken place. He explained his loss of memory on the grounds that Heidt was a friend and that he, Kwiek, did not want to be involved; besides, he was off duty at the time.

The petitioner also fails to report to the Court the evidence adduced before the administrative agency that he received a subpoena to appear for the defense when Heidt was being tried on August 10, 1972. This subpoena was not reported to his commanding officer, despite the departmental rule, and the Police Department heard about the subpoena only from another witness who had observed Kwiek in court on that day. (Abst. 37, Addl. Abst. 5) Kwiek's commanding officer specifically testified that Kwiek never told him he had received a subpoena in the case. (Abst. 42, 43)

The evidence also omitted from the petitioner's statement of facts included testimony that Kwiek had told a polygraph

examiner that he had removed D.W.I. reports from the Schaumburg Police Department and taken them home without proper authorization.

Also omitted is the testimony of Kenneth Dopp of a conversation with Kwiek where Kwiek indicated he had removed the Greco incident file from the police station, had photocopied the report, and then had taken it to his home. (Addl. Abst. 4)

The petitioner does not even fully report his own testimony before the administrative agency. He admitted removing records from the Schaumburg Police Department. (Addl. Abst. 7) He had never reported his suspicions about Heidt and the Greenfield letters to his superior officers. (Addl. Abst. 8) He admitted that he had voluntarily called Heidt's attorneys to tell them when he finally gave a statement with respect to the events occurring at Heidt's home, although he had not been requested to notify them if a statement was given. (Addl. Abst. 8)

Despite the fact that he was a police officer and was present at the scene when stolen goods were recovered and Heidt was arrested, Kwiek did not feel he had any responsibility to the state or to the prosecutor. He felt he had no responsibility to give any statements. (Addl. Abst. 8)

Thus, there were three additional charges, having nothing to do with any First or Fourteenth Amendment rights, which were the subject matter of the trial before the administrative agency. In reading the petition, one would never know that the petitioner had been tried and found guilty of giving false reports to his superiors, failing to report a subpoena, and removing Police Department files without authorization. Thus, the petition filed herein by its blatant omissions gives a completely false statement of the facts of this case.

There is another critical aspect in which the petitioner's statement of the case is apparently designed to mislead this Court. The entire petition is based upon a constitutional challenge to the validity of the Village's Rules. Yet, no such con-

stitutional question was ever raised before the trial court, and the constitutional questions were thereby clearly waived.

The proceeding was initiated by a complaint for administrative review pursuant to the provisions of the Administrative Review Act which provides for judicial review of administrative decisions by agencies such as the Board of Fire and Police Commissioners. (Ill. Rev. Stat. 1975, Ch. 110, § 264) The complaint for administrative review failed to raise any constitutional question. It states that the findings of the administrative agency "are contrary to the manifest weight of the evidence." (Abst. 20) Nowhere in the five page complaint is there any allegation that any Rules of the Board of Fire and Police Commissioners were invalid or unconstitutional.

Under the provisions of Section 9 of the Administrative Review Act (Ill. Rev. Stat. 1975, Ch. 110, § 272), upon the motion of the defendant or upon the court's own motion, the court may require of the plaintiff a specification of errors relied upon for reversal. Pursuant to such motion, a Memorandum of Errors was filed by the plaintiff in this case. (Abst. A22-A29) Here again, there was absolutely no allegation that Paragraphs 20, 22 or 38 were unconstitutional. The only reference to any of these Rules was found in paragraph 3 of the Memorandum of Errors, in which the following appears:

> "At Page 239 of the transcript of the proceedings, Mr. Arthur Loevy, the attorney for the Respondent, raised the issue of the constitutionality of Paragraph 22, Section 1 of the Rules and Regulations of the Department of Police of the Village of Schaumburg. In support of his contention that the aforementioned rule was violative of the First Amendment right to freedom of speech, Mr. Loevy cited *Miller* v. *Conlisk*, 429 Fed. 901, 1970, and *Flynn* v. *Giarusso*, 321 Fed. Suppl. 1295, 1971. While the record does reflect some attempt by the attorney for the Board of Fire and Police Commissioners of the Village of Schaumburg to respond to the aforementioned, there is nothing in the record to indicate any such response was ever made." (Abst. A25)

There is no allegation in the Memorandum of Errors that Paragraph 22 or any other paragraph of the Rules was unconstitutional. The trial court thus properly did not pass upon the constitutional challenges now belatedly made before this Court. The final judgment order of the trial court specifically recites that the court was making its determination "without passing on the constitutionality of Paragraph 22 of the Rules and Regulations." The trial court went on to find "that there was sufficient evidence in the record to support the findings and determination of the Board of Fire and Police Commissioners of the Village of Schaumburg" and "that the findings and conclusions of said Board are not against the manifest weight of the evidence." The court then affirmed the Findings and Decision of the Board, dated April 17, 1972. (Abst. 30)

As indicated in the petition, the Appellate Court, finding that the case raised no questions which were fairly debatable, affirmed the trial court by order rather than opinion pursuant to Rule 23 of the Illinois Supreme Court. (Ill. Rev. Stat. 1975, Ch. 110, § 23)

Thus, contrary to the impression sought to be engendered by the petitioner's statement of the case, this cause involved three additional charges of which the petitioner was found guilty, which are not even mentioned in the petition. It also involved a complaint and specification of errors in which the constitutional questions were not raised and thereby waived. The questions now sought to be raised in this Court were actually sought to be raised for the first time in the Appellate Court and in the petition for leave to appeal to the Illinois Supreme Court, which petition was properly denied by that Court on January 23, 1976.

REASONS FOR NOT GRANTING THE WRIT.

I.

The Petitioner Was Not Denied His Fourteenth Amendment Right to Due Process Because the Courts Failed to Consider the Constitutionality of Rules 20, 22 and 38.

The petitioner was clearly not denied his Fourteenth Amendment rights because neither the trial court, the Appellate Court nor the Supreme Court of Illinois considered the constitutional challenge to Rules 20, 22 and 38. Such a challenge was never made in the trial court either by the complaint or Memorandum of Errors. Moreover, even had the challenge been made, there was ample evidence in the record to support the decision of the administrative agency without considering the constitutional question.

The Illinois courts have accepted the general rule that constitutional questions will not be considered if the case may be disposed of on other grounds. *People* v. *Vandiver*, 51 Ill. 2d 525, 527 (1971); *People* v. *Dixon*, 28 Ill. 2d 122, 125 (1963); *Osborn* v. *Village of River Forest*, 21 Ill. 2d 246, 249 (1961).

This Court has of course followed the same principle and has not decided constitutional questions when the case may be decided on non-constitutional grounds. *Hagans* v. *Lavine*, 415 U. S. 528, 547 (1974), 39 L. Ed. 2d 577, 594; *United States* v. *Campos-Serrano*, 404 U. S. 293, 295 (1971), 30 L. Ed. 2d 457, 460; *Alexander* v. *Louisiana*, 405 U. S. 625, 633 (1972), 31 L. Ed. 2d 536, 544; *Burton* v. *United States*, 196 U. S. 283, 295 (1905), 49 L. Ed. 482, 485.

It is clear in this case that the petitioner was not denied due process or that he was denied the right to be heard. There was an extensive hearing before the administrative agency. There was judicial review as provided by Statute in the trial court. The matter was heard in the Appellate Court for the

First District and considered on petition for leave to appeal by the Illinois Supreme Court. All three courts had before them the entire record in the proceeding below. The failure to pass upon the constitutional questions arose simply out of the fact that the questions not only were not presented, but it was not necessary to pass upon the constitutional questions in order to decide the case.

When there are multiple charges against a public employee as in the instant case, a single valid finding is sufficient to constitute the basis for entering an order of discharge and the other contentions need not be considered. *Moriarty* v. *Police Board of Chicago*, 7 Ill. App. 3d 978, 982 (1972); *DeGrazio* v. *Civil Service Commission*, 31 Ill. 2d 482, 489 (1964). Here, of course, there was ample evidence to support all the charges, including three charges unrelated to Rules 20, 22 and 38.

Under Illinois law a reviewing court will not disturb the factual findings of an administrative agency unless the findings are clearly against the manifest weight of the evidence. The court will not reweigh the evidence even though an opposite conclusion might be reasonable. *Moriarty* v. *Police Board of Chicago*, 7 Ill. App. 3d 978, 982 (1972); *DeGrazio* v. *Civil Service Commission*, 31 Ill. 2d 482, 489 (1964); *Davern* v. *Civil Service Commission*, 47 Ill. 2d 469 (1971). Thus, there was no necessity to have considered the constitutional questions involved in Rules 20, 22 and 38, even had they been presented.

This Court's decision in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970) dealt with the necessity of a hearing for the termination of public assistance benefits. It of course has nothing to do with the instant case where ample hearing was afforded the petitioner and ample evidence adduced to support his discharge on at least six grounds. The case of *Railroad Commission of California* v. *Pacific Gas and Electric Company*, 302 U. S. 388 (1938), also cited by the petitioner, had to do with due process in a state's utility ratemaking procedures. Again, an examination of the case

shows it has absolutely no bearing on the issues presented in this petition.

Chaffin v. *Stynchcombe*, 412 U. S. 17 (1973), had to do with due process in sentencing upon reconviction. The Court held that there was no violation of due process because the prisoner had received a more severe sentence on reconviction.

Finally, it should be noted that this Court in the very recent case of *Bishop* v. *Wood*, No. 74-1303, decided June 10, 1976, ... U. S. ....., 44 LW 4820, specifically held that a police officer did not have a property right in his position and that the petitioner's discharge, even if wrongful, did not deprive him of a property interest protected by the due process clause of the Fourteenth Amendment.

We therefore respectfully suggest that there was no denial to the petitioner of any Fourteenth Amendment right because the trial, Appellate and Supreme Courts of Illinois refused to consider a constitutional question which was not properly before them in a case where there were multiple bases for discharge shown and where there was no property right in the petitioner's position as a police officer which was protected by the Fourteenth Amendment.

II.

Paragraphs 20, 22 and 38 of the Rules and Regulations of the Schaumburg Police Department Are Not Unconstitutional.

As we have indicated above, the constitutionality of these Rules was not properly before any of the state courts. The petitioner simply failed to raise the constitutional issues. As a matter of fact in his Memorandum of Errors, only Rule 22 was mentioned and then in an oblique manner not constituting a specific challenge to its constitutionality.

Moreover, it is quite clear that the regulations in question need not be considered by this Court because there was ample bases for the petitioner's discharge on grounds other than the

Rules which are now challenged. This Court, like the Illinois Supreme Court, should therefore not pass upon a constitutional challenge when there are other grounds for fully and fairly disposing of the action.

The petitioner relies primarily upon the Seventh Circuit decision of *Muller* v. *Conlisk*, 429 F. 2d 901 (7th Cir. 1970). It should be noted in the first instance that the rule challenged in the *Muller* case was much broader than the Rules purportedly challenged here for the first time. The Chicago Police Department rule in question covered "any activity, any conversation, any deliberation, or any discussion," which was derogatory to the Department or any other member or policy of the Department. Not only did the Chicago rule go well beyond the language of the Schaumburg rule but, unlike the rule in *Muller*, the Schaumburg Rule provided a remedy under Rule 22 for actions which were properly subject to criticism. If such actions are a violation of the Rules and Regulations, they were to be reported to the superior officer of the policeman making such an observation. Rule 20, which was never challenged, restricts speech only to that which is critical or derogatory regarding the orders or instructions issued by a superior officer, and again provides that when such orders or instructions are inconsistent or unjust, the right of appeal to higher authority is to be followed. Rule 38, which was also never challenged, prohibits the giving out of information without the consent of the commanding officer, certainly a reasonable and legitimate method of maintaining discipline and insuring the orderly dissemination of information.

As a matter of fact, based upon subsequent decisions of this Court, the Seventh Circuit has substantially retreated from its ruling in *Muller*. In the case of *Herzbrun* v. *Milwaukee County*, 504 F. 2d 1189 (7th Cir. 1974), the Court held valid against a challenge of vagueness and overbreadth a rule permitting discharge "necessary or desirable for the economical or efficient conduct of the business of the county or for the best interest of the

county government." After referring to the *Muller* case, the Court noted:

> "Several decisions by the Supreme Court, reached since the decision by the district court herein, and indeed since submission of this appeal, require careful scrutiny with respect to an overbreadth challenge here."

The Court then went on to cite *Arnett* v. *Kennedy,* 416 U. S. 134, 40 L. Ed. 2d 15 (1974); *Parker* v. *Levy,* 417 U. S. 733, 41 L. Ed. 2d 439 (1974); *Secretary of the Navy* v. *Avrech,* 418 U. S. 676, 41 L. Ed. 2d 1033 (1974). Also cited was *Broadrick* v. *Oklahoma,* 413 U. S. 601, 37 L. Ed. 2d 830 (1973).

In the *Arnett* case, this Court sustained the removal of a government employee "for such cause as will promote the efficiency of the service." The *Parker* case sustained an attack on a provision in the Uniform Code of Military Justice which provided for punishment for "conduct unbecoming an officer and a gentleman" and proscribed "all disorders and neglect to the prejudice of good order and discipline in the armed forces." The Court did not hesitate to apply the First Amendment to these provisions, but held that they were not overbroad.

See also, *United States Civil Service Commission* v. *National Association of Letter Carriers,* 413 U. S. 548, 37 L. Ed. 2d 796 (1973).

The test that this Court applied in *Levy* was whether the language gave fair warning as to the kind of conduct which was prohibited. This is the same test applied by the Illinois Supreme Court where, as the Court said in *City of Chicago* v. *Lawrence,* 42 Ill. 2d 461, 464 (1969):

> "An ordinance may describe conduct by their use where the meaning is clear enough to people contemplating such behavior, the test being whether they convey sufficient definite warning as to proscribed conduct when measured by common understanding and practices."

See also, *City of Decatur* v. *Kushmer,* 43 Ill. 2d 334, 336 (1969); and *City of Chicago* v. *Fort,* 46 Ill. 2d 12, 16 (1970).

Also cited but not argued by the petitioner is the case of *Flynn* v. *Giarrusso,* 321 F. Supp. 1295 (E. D. La. 1971), a trial court decision where a police lieutenant had been suspended for writing an article critical of the administration. In that case the Court recognized that the State had an interest in promoting the efficiency of the public service by which it could impose conditions on the First Amendment rights of its employees. The rule in question provided that a member of the force shall not unjustly criticize, ridicule or express hatred toward any person and shall conduct himself in accordance with the highest degree of morality. Even if the Court was right in the *Flynn* case, the rule there was obviously so broad and vague on its face as to render its precedential value absolutely nill in the case at bar.

The petitioner also cites the recent decision in *Kelley* v. *Johnson,* 47 L. Ed. 2d 708, where this Court sustained, against a Fourteenth Amendment challenge, the right of a police department to establish hair grooming standards. We suggest that the Police Department certainly has at least as great an interest in the prevention of insubordination and unjust criticism which can bring the Department into disrepute and lower morale as it does in enforcing hair grooming regulations.

To suggest as the petitioner does that derogatory and critical statements should be considered only when made publicly is of course to ignore the fact that internal dissemination has the greatest long range effect upon the efficiency of the Police Department. The fact that the acts of the petitioner did not impair the efficiency and discipline of the Police Department is more a tribute to the caliber of the Police Department than a justification for the disloyal and insubordinate behavior of former Officer Kwiek.

It is a strange twist of logic that would hold, as the petitioner suggests, that the giving of a statement about a pending criminal matter by a police officer who was present when the defendant was apprehended, was not germane to the "affairs, business or

operation of the Police Department." Whether or not a statement might be discoverable under the rules of court has nothing to do with the unauthorized dissemination of information vital to the prosecution of a criminal defendant.

The fact of the matter is that former Officer Kwiek, the petitioner in this case, not only violated the Rules which are now inaccurately attacked as being unconstitutional, but he also violated Rules not even mentioned in his petition. Any of these violations would be sufficient to justify his discharge. The totality of the offenses, which was reviewed not only by the administrative agency but by the trial court and the Appellate and Supreme Courts of this State, made his discharge imperative in the public interest.

The best answer to the allegation that this Court must pass upon the issues here in order to fulfill obligations under the Constitution of the United States is contained in the language of this Court in *Bishop* v. *Wood* at 44 LW 4822, where this Court says: "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."

We respectfully suggest that the petitioner has been accorded every aspect of due process. The hearing procedure below and the judicial review which followed were complete and in all respects fair. The petitioner was granted every conceivable opportunity by the State courts to justify conduct which made his removal necessary. He was unable to do so. We suggest that his failure lies not in any deficiencies of the State judicial system, but rather in his own deficiencies as a police officer.

CONCLUSION.

For the reasons stated above, the respondents respectfully request that the writ of certiorari to review the judgment and opinion of the Illinois Appellate Court, First District, be denied.

Respectfully submitted,

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